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No. 78-917

In the Supreme Court of the United States

OCTOBER TERM, 1978

RAY J. BERAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 580 F.2d 324. The order of the district court (Pet. App. 15a-16a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1978. A petition for rehearing was denied on August 29, 1978 (Pet. App. 8a). On November 18, 1978, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to

and including December 8, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the representation of petitioner and his co-defendant by the same counsel was reversible error.

2. Whether counsel's failure to move for a mistrial and for a new trial constituted ineffective assistance of counsel.

STATEMENT

Petitioner and co-defendant Andrew Kaminski were tried in the United States District Court for the District of North Dakota on a 12-count indictment charging them individually or together with misapplying the funds of a federally-insured bank, in violation of 18 U.S.C. 656.

At the close of the prosecution's case, the trial court granted a defense motion for a judgment of acquittal on Count 1, which charged both co-defendants with misapplying $482,000 in bank funds by selling an unauthorized overissue of bank stocks. The court ruled that the government had failed to prove that bank funds were involved in these transactions (Pet. App. 20a). The remaining counts, however, were submitted to the jury.

Petitioner was acquitted on three counts (Counts 2, 3, and 4) and was convicted on the following four counts: Count 7, in which petitioner was charged

with causing the bank to finance a bogus feedlot feasability study and converting the bank's payments to his own use; Count 9, in which petitioner and Kaminski were charged with fraudulently billing the bank for $1,000 in legal services that were provided to petitioner and Kaminski; Count 10, in which petitioner and Kaminski were charged with converting the bank's funds by withdrawing $12,000 from the account of an insurance agency that was wholly owned by the bank; and Count 12, in which petitioner was charged with collecting from the bank for unauthorized expenses. See *United States* v. *Beran*, 546 F.2d 1316, 1321 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977).

Petitioner was sentenced to two years' probation and fined $3,000, with imposition of any additional sentences suspended. His conviction was affirmed on direct appeal, and this Court denied a petition for a writ of certiorari. *United States* v. *Beran*, *supra*.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that he was deprived of effective assistance of counsel because he and Kaminski were represented at trial by the same, jointly retained attorney, and because of various procedural errors made by this counsel. The district court denied the petition after an evidentiary hearing (Pet. App. 15a-17a), and the court of appeals affirmed (Pet. App. 1a-7a).

ARGUMENT

1. Petitioner contends (Pet. 11-19) that he was denied effective assistance of counsel because he and Kaminski had conflicting interests but were represented at trial by the same retained counsel. He urges that because the trial court did not apprise him of the dangers inherent in joint representation, the burden was on the government to "clearly establish" that he was "*not* * * * harmed by conflicts of interest" (Pet. 12, 16, 18), and he asserts that the government could not meet this burden. He also argues that the court below erred by not placing the burden of showing absence of prejudice on the government, and that its decision in this regard is in conflict with decisions of the First and Second Circuits (Pet. 12).

As this Court noted in *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978), "in some cases multiple defendants can appropriately be represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." The courts of appeals agree therefore that joint representation is not a *per se* violation of a defendant's right to counsel. But as this Court further observed, the courts of appeals "have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests" (*id.* at 483). These courts have also "differed

on how strong a showing of conflict must be made * * * before [the reviewing court] will conclude that the defendants were deprived of their right to the effective assistance of counsel" (*ibid.*).

One aspect of this divergence in views is disagreement among the courts of appeals as to which party bears the burden of showing the absence (or presence) of a conflict of interest. The courts of appeals that require a federal trial court to make a pretrial inquiry whenever defendants in a criminal trial are jointly represented by the same counsel have also held that where an adequate pretrial inquiry is not made, the burden of showing absence of conflict falls on the government. See *United States* v. *DeBarry*, 487 F.2d 448, 453 n.6 (2d Cir. 1973); *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972).[1] Other circuits appear to place the burden of showing conflict and prejudice on the defendant. See, *e.g.*, *United States* v. *Lawriw*, 568 F.2d 98, 105 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978); *United States* v. *Smith*, 550 F.2d 277, 286 (5th Cir. 1977); *United*

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[1] In addition, the United States Court of Appeals for the District of Columbia Circuit has held that where an adequate pretrial inquiry has not been conducted, the conviction will be affirmed only if " 'we can find no basis in the record for an informed speculation' that appellant's rights were prejudicially affected." *Lollar* v. *United States*, 376 F.2d 243, 247 (1967). This appears to relieve the defendant of the initial burden of showing prejudice, since the court will review the record for prejudice on its own initiative, and the government consequently must explain any appearances of prejudice.

States v. *Mandell*, 525 F.2d 671, 677 & n.11 (7th Cir. 1975).[2]

However, even those courts that would have placed the burden on the government to show absence of prejudice in this case[3] would agree with the Eighth Circuit here that petitioner was not denied effective assistance of counsel. As the Eighth Circuit noted, "this case is unusually free of any indicia of divergent interests of the two petitioners" (Pet. App. 3a).

Petitioner asserts (Pet. 17-18) that a conflict of interest existed because Kaminski was charged with the more serious crimes. But prejudice resulting from a joint trial with a co-defendant charged with more serious crimes is not cured by retaining separate counsel; and petitioner does not suggest how

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[2] As petitioner notes, some circuits have placed the burden of showing conflict and prejudice on the defendant but require only a slight showing. See, *e.g.*, *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203, 209 (3d Cir. 1973). In *Davenport*, however, substantial conflicts existed that would have established prejudice under any standard, so the court did not have occasion to test the limits of its statement that only a possible conflict of interest, "however remote," need be shown.

[3] The First Circuit has indicated that the proper standard of review in collateral attacks on federal convictions, such as petitioner's here, is whether the government can show "unlikelihood of prejudice by a preponderance of the evidence." *United States* v. *Foster*, *supra*, 469 F.2d at 5. The Second Circuit has agreed with *Foster* that the government should bear the burden of proof, but apparently has not specified what the standard of proof should be in collateral attacks on federal convictions. See *United States* v. *DeBarry*, *supra*, 487 F.2d at 453 n.6.

any disparity in the seriousness of petitioner's and Kaminski's offenses would have affected his own trial tactics.

Petitioner further asserts that a conflict existed because defense counsel could not "negate an intent to defraud on his part * * * without highlighting the aggravating circumstances of the co-defendant's conduct." But this claim is unsupported by any explanation of the nature of these "aggravating circumstances" or how "highlighting" them would have aided petitioner. In fact, two of the four counts (Counts 7 and 12) on which petitioner was convicted charged him alone. As to the remaining two counts (Counts 9 and 10), we are unable to discern what "aggravating circumstances" in Kaminski's conduct would have tended to show that petitioner did not act with specific intent to misapply bank funds.

Petitioner did not deny that he and Kaminski caused the bank to pay $1,000 for legal services that were performed solely for his and Kaminski's benefit (Count 9). Rather, he and his co-defendant claimed that they acted in good faith, making no effort to conceal this transaction, and intended that these legal services would ultimately benefit the bank by speeding the transfer of ownership of the bank (Tr. 726-728, 835). Similarly, petitioner did not deny the transaction charged in Count 10, in which he and Kaminski withdrew $12,000 from an account belonging to an insurance agency that was wholly owned by the bank. Instead, he again claimed that they

acted in good faith, making no effort to conceal the transaction; he asserted that he believed that the withdrawal of funds was permissible because he planned to use the funds to charter a bank holding company of which the bank could profitably become a part (Tr. 739-749).

The "innocent bystander" theory of defense that petitioner now appears to be espousing would not have been consistent with his own admissions at trial that he was fully involved in both these schemes. He cannot complain now that the jury chose to regard as fabrications his explanations of why he thought his actions were permissible because in the best interest of the bank (see 546 F.2d at 1321 n.7).

In sum, therefore, the government could and did fully bear any burden of showing "unlikelihood of prejudice" from joint representation even under the First Circuit's standard (*United States* v. *Foster*, *supra*). See also *United States* v. *DeBarry*, *supra*. As the court below noted (Pet. App. 3a):

> Petitioners have not pointed to a single instance before, during, or after trial when they were in positions adverse to one another. Both denied their guilt and neither fixed any blame on the other. Both testified and their testimony was similar and consistent. Their theories of defense were the same. No suggestion has been made that any other, perhaps incompatible, defenses existed or that any witnesses possessed information harmful to one and helpful to the other, so that counsel's examinations were hampered by divided loyalties.

2. Petitioner also contends (Pet. 19-27) that trial counsel's failure to move for a mistrial after dismissal of Count 1 and to make a timely motion for a new trial was so significant that it deprived petitioner of effective assistance of counsel. He argues that the jury could not have disregarded the first count in deciding the other counts, and therefore a competent counsel would necessarily have moved for mistrial when the first count was dismissed.

However, as the court below concluded (Pet. App. 5a), "[p]lausible strategic reasons existed for bypassing the [motion] for * * * a mistrial." The government's case suffered a serious setback when the first, and most significant, count was dismissed. Defense counsel had to decide at that time whether it was more advantageous to allow the government to proceed with its case, or to give the prosecution a fresh start at a second trial, at which time at least some of the Count 1 evidence would be admissible in any event. Fed. R. Evid. 404(b). Petitioner's counsel chose a reasonable alternative in proceeding to a verdict.

Petitioner argues (Pet. 25-26), however, that in light of other actions by counsel suggesting incompetence, one cannot conclude that counsel made a tactical choice in the present matter. But counsel, during final argument to the jury, specifically capitalized on dismissal of the first count (Tr. 1170-1171):

> [Y]ou see what happen[ed] to [that] accusation[]. Two weeks of trial! All of those people from Belfield paraded in here! And the Govern-

> ment sought, I think, to prove that Mr. Kaminski and [petitioner] cheated them. But those people got everything they were promised. They are now the owners of that Bank and their stock's worth $2,000 a share.
>
> Good character evidence.

Since counsel made full use of the government's failure to prove Count 1, suggesting that petitioner acted in good faith in the remaining transactions as well, it is reasonable to conclude that he intentionally proceeded to a verdict, rather than moving for a mistrial.

Petitioner also contends (Pet. 23-24) that counsel's failure to move for a new trial showed ineffective assistance of counsel because petitioner "lost forever the opportunity to have the trial court exercise its discretion as to whether the petitioner should receive a trial free of the taint of the Count 1 evidence" (Pet. 23). It is unlikely, however, that he was prejudiced by this failure by counsel. The jury was carefully instructed on two occasions to disregard any evidence that pertained only to Count 1 (Tr. 700, 1188). In addition, counsel and the court reviewed each Count 1 exhibit, and excluded all those Count 1 exhibits that were relevant only to Count 1 or that were merely cumulative of evidence already admitted with respect to the other counts (see Tr. 1042-1067). The jury is presumed to follow instructions, in the absence of convincing evidence to the contrary (*Opper* v. *United States*, 348 U.S. 84, 95 (1954)); and the jury here apparently did so, exercising independent judgment,

since they acquitted petitioner and Kaminski on a number of counts. On these facts, there is no reason to believe that petitioner would have been granted a new trial even if he had asked for one in a timely manner.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The suggestion (Pet. 4, 25) that counsel failed, because of neglect or excessive drinking, adequately to prepare a defense has been rejected by both courts below (Pet. App. 4a-5a & n.1; 10a). As the court of appeals observed, "the trial judge who presided over the long proceedings and was in the best position to assess such a claim, ruled against petitioner[] on this issue" (Pet. App. 7a). The issue therefore does not warrant further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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